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In The

Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.

Petitioner,

v.

JOSHUA DAVEY,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION

in support of the *Respondent*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. THE FREE EXERCISE CLAUSE ALLOWS GOVERNMENT TO ENCOURAGE RELIGION AND PROHIBITS GOVERNMENT HOSTILITY TOWARDS RELIGION 2

A. The Framers of the Free Exercise Clause Intended it to Prohibit Hostility 6

1. Virginia's battle over religious liberty is a leading example of the prohibition of hostility. 6

2. Joseph Story understood the Clause as allowing government encouragement of religion 8

B. A Stricter View of the Virginia Materials Still Prohibits Hostility 9

C. The Constitutions Proscription of Religious Tests is an Example of the Type of Hostility They Intended the Entire Free Exercise Clause to Prohibit 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Allegheny County v. ACLU
492 U.S. 573 (1989).....3

Bender v. Williamsport Area Sch. Dist.
475 U.S. 534 (1986).....3

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993)..... 4-5

Committee for Pub. Educ. & Religious Liberty v. Nyquist,
413 U.S. 756 (1973).....3

Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990).....5

Epperson v. Arkansas, 393 U.S. 97 (1968).....3

Everson v. Bd. of Educ., 330 U.S. 1 (1947).....6

Good News Club v. Milford Cent. Sch.
533 U.S. 98 (2001).....3

Lamb's Chapel v. Center Moriches Union Free Sch. Dist.
508 U.S. 384 (1993).....3

Lemon v. Kurtzman, 403 U.S. 602 (1971) 3,4

McDaniel v. Paty, 435 U.S. 618 (1978).....12

Meek v. Pittenger, 421 U.S. 349 (1975) 3

Rosenberger v. Rector and Visitors of Univ. of Virginia
515 U.S. 819 (1995).....3,7

School Dist. of Abington Township v. Schempp
374 U.S. 203 (1963).....3

Wallace v. Jaffree, 472 U.S. 38 (1985).....3,9

Walz v. Tax Com. of New York,
397 U.S. 664 (1970).....3,6

Zorach v. Clauson, 343 U.S. 306 (1952) 3

OTHER AUTHORITIES

Oliver Ellsworth, *On a Religious Test for Holding Public Office, in*, 3 *Annals of America* 169 (1968) 11,12

Thomas Jefferson, *Virginia Statute of Religious Freedom*, Article 1, *in* 3 *Annals of America* 53-54 (1968).....6,11

James Madison, *Memorial and Remonstrance Against Religious Assessments*, Article 4, *in* 3 *Annals of America* 16 (1968).....6,7,9,10

Philip Munoz, *James Madison's Principle of Religious Liberty*, Am. Pol. Sci. Rev., Feb. 2003, 17 10

Joseph Story, *Commentaries on the Constitution of the United States* § 1865 (Arthur E. Sutherland ed., Da Capo Press 1970) (1833) 8-9

John Witte, Jr., *Religion and the American* Constitutional Experiment: Essential Rights and Liberties 72 (2000) 5

INTEREST OF THE *AMICUS*[1]

Amicus Curiae The National Legal Foundation (NLF) is a 501c(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts. The NLF has gained valuable expertise in the area of First Amendment law, which it believes will assist this Court in deciding this case. The NLF has an interest, on behalf of its constituents and supporters, in arguing on behalf of people of faith.

This brief is filed pursuant to the consent of the counsel of record for all parties.

SUMMARY OF THE ARGUMENT

The Free Exercise Clause of the United States Constitution allows the State of Washington to encourage religion. It also prohibits it from being hostile to religion. However, in its Promise Scholarship Program, Washington deliberately chose not to encourage religion, but instead to be hostile to it by imposing unique disabilities one those seeking theological training.

This decision by Washington violates the intent of the Framers of the Religion Clauses. Although more often associated with Establishment Clause jurisprudence, this Court has acknowledged that hostility towards religion also violates the Free Exercise Clause. By looking at the limited

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[1] No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

data from the Drafters of the First Amendment, at the Virginia Statute of Religious Freedom, at James Madison's Memorial and Remonstrance, at Justice Story's Commentaries on the Constitution, and at the Religious Test Clause of the Constitution, one can discern the principles animating the Free Exercise Clause. First, the Clause protects actions, not just beliefs. Second, the Clause was designed to prevent burdens from being imposed on the basis of religion. Third, religion should not be "leveled" with other aspects of our public life. This is closely related to the idea of encouraging religion. However, even if one rejects the principle of encouragement, an alternative plausible construction of the Free Exercise Clause would require non-cognizance of religion. This principle would likewise prohibit hostility. For all these reasons, Washington's Program violates the Free Exercise Clause and the judgment of the Ninth Circuit should be affirmed.

ARGUMENT

I. THE FREE EXERCISE CLAUSE ALLOWS GOVERNMENT TO ENCOURAGE RELIGION AND PROHIBITS GOVERNMENT HOSTILITY TOWARDS RELIGION.

This case is about Washington State's deliberate choice between encouraging religion, being neutral to religion, or being hostile to religion. When it chose to enact the Washington Promise Scholarship Program, it could have included or excluded the funding of religious education. Including religion could arguably be characterized as encouraging religion or as being neutral towards religion. While Amicus believes that the better characterization is that inclusion would have constituted neutrality, neither characterization is problematic since either would be permissible under this Court's Religion Clause jurisprudence.

First, it is a First Amendment commonplace that government should be neutral towards religion. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 839 (1995); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 215-18 (1963).

However, this Court has not construed the neutrality principle as antithetical to encouraging religion, at least in certain senses of that word. And this is not surprising, for as this Court stated in a much-cited passage from its opinion in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), "[w]e are a religious people whose institutions presuppose a Supreme Being."

Specifically, the following words have appeared in no less than ten Supreme Court opinions by the following justices: "When the state encourages religious instruction . . . it follows the best of our traditions." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400-01 (1993) (Scalia & Thomas, JJ,, concurring); *Allegheny County v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, White & Scalia, J.J., & Rehnquist, C.J., concurring in the judgment in part and dissenting in part) *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 554 (1986) (Burger, C.J., & White & Rehnquist, J.J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Burger, C.J., concurring in the judgment in part and dissenting in part); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Rehnquist & White, J.J., concurring in the judgment in part and dissenting in part); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 813 (1973) (White, J., dissenting, joined in part by Burger, C.J., & Rehnquist, J.) (opinion applying also to two consolidated cases); *Lemon v. Kurtzman*, 403 U.S. 602, 661 (1971) (White, J., concurring in two consolidated cases and dissenting in two consolidated cases); *Walz v. Tax Com. of New York*, 397 U.S. 664, 671 (1970) (Burger, C.J.,

& Black, Stewart, White, & Marshall, J.J.); and *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (Vinson, C.J., & Reed, Douglas, Burton, Clark, & Minton, J.J.).[2]

What this Court has ruled out is hostility towards religion. In each of the "neutrality" cases cited above, hostility is painted as the opposite of neutrality; and in each of the "encouragement" cases cited above, excepting only *Lemon v. Kurtzman*, hostility is also set in juxtaposition to encouragement. Furthermore, while the prohibition on hostility may be more familiar in an Establishment Clause context,[3] this Court has made it clear that the prohibition on hostility is also a stricture of the Free Exercise Clause. First, many cases cited above indicate that the prohibition on hostility arises from both of the Religion Clauses. Furthermore, and importantly for the instant case, this Court has stated that hostility is prohibited by the Free Exercise Clause alone.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), this Court stated that "[t]he Free Exercise Clause protects against government hostility which is masked, as well as overt." In *Lukumi*, Justice Souter noted in his concurring opinion that

> [t]here appears to be a strong argument from the Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God.

Id. at 575-76 (Souter, J., concurring).

[2] All but Justice O'Connor's are positive invocations of this proposition. Justice O'Connor noted that the proposition was inapposite as used by appellants.

[3] One *very* rough indicator of this fact can be demonstrated by searching this Court's opinions electronically. Searching for the words "hostile" and "hostility" in the same sentence with "Establishment Clause" produces five times as many results as when searching for those words in the same sentence with "Free Exercise Clause."

Joshua Davey is trying to fulfill his duty to his God. The Washington legislature, in carving out an exception for theology majors, has demonstrated hostility toward actions carried out pursuant to that duty. Thus, the exception is unconstitutional under the principles articulated in the *Lukumi* opinions.

While a main point of Justice Souter's concurrence was to question the validity of the rule laid down in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), that dispute need not be settled to recognize the validity of some aspects of Justice Souter's assertions. As Justice Souter stated, the scholarship on this point is not uniform. However, this Amicus brief will address those items that are less speculative and more easily demonstrated. On the basis of this historical data alone, it is clear that Washington's Program is hostile to religion and thus violative of the Free Exercise Clause.

As Justice Souter noted, one of the indications that the Free Exercise Clause was designed to "preserve a right to engage in activities" is the development of the Clause. While the debates over the final language of the Free Exercise Clause are not recorded, one important change has been noted by many scholars: over the course of twenty drafts, the language of freedom of conscience was replaced with freedom to exercise religion. *See, e.g.*, John Witte, Jr., *Religion and the American* Constitutional Experiment: Essential Rights and Liberties 72 (2000). Not only religiously motivated beliefs, but also religiously motivated actions, were to be protected from government hostility.

A. The Framers of the Free Exercise Clause Intended it to Prohibit Hostility.

However, accepting this premise, one must look elsewhere for what exactly the Framers considered government hostility to be. As this Court has stated, it "has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Statute of Religious Freedom. *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947). James Madison's Memorial and Remonstrance Against Religious Assessments has similarly been cited as the document that cleared the way for the passage of the Virginia Statute. *Id.* Justice Douglas also specifically noted the Memorial's relevance to Free Exercise principles. *Walz v. Tax Com. of New York*, 397 U.S. 664, 706 (1970) (Douglas, J., dissenting).

1. Virginia's battle over religious liberty is a leading example of the prohibition of hostility.

The background of these documents and the assessment controversy that engendered them has been well documented in this Court's opinions. *See, e.g., Everson,* 330 U.S. at 9-15. For purposes of this brief, it suffices to point out that the Virginia Statute of Religious Freedom, written by Thomas Jefferson, shows at least one type of hostility that would come to be forbidden by the Free Exercise Clause. Although Jefferson's concern in this regard was with the establishment of religion, he implicitly had a concern for the hostility that "unestablished" sects would face. *See* Thomas

Jefferson, *Virginia Statute of Religious Freedom*, Article 1, *in* 3 *Annals of America* 53-54 (1968).[4]

Perhaps the most telling passage from Jefferson's Bill is the second Article which states that "no man shall be . . . enforced, restrained, molested, or burdened, nor shall otherwise suffer on account of his religious opinions." *Id.* at 54. Jefferson, along with the Virginia General Assembly when it passed the statute in 1786, was concerned with acts that went beyond encouragement, created an establishment, and might subsequently lead to the suppression of the free exercise of religion. The kind of discouragement, or hostility, that the Bill prevented was, in part, one in which people would be "burdened." Undeniably, the Washington Promise Scholarship Program burdens Davey. All eligible students not studying theology are given access to state funding which is denied to him solely because he seeks to study in preparation for a career in ministry—a quintessential exercise of religion.

Similarly, the Memorial and Remonstrance demonstrates a concern that the free exercise of religion not be burdened. As pointed out by Justice Thomas in *Rosenburger v. Rector and Visitors Of University of Virginia*, 515 U.S. 819, 854-55 (1995) (Thomas, J., concurring), Madison, at several points in the Memorial was concerned that some sects would be comparatively burdened by not being eligible for benefits extended to other sects. When speaking of the exemption made to the Quakers and Mennonites, Madison asked, "Ought their religions to be endowed above all others . . . ?" James Madison, *Memorial and Remonstrance Against Religious Assessments*, Article 4, *in* 3 *Annals of America* 5, 18 (1968). While various

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[4] Often referred to by this Court as the Virginia Bill for Religious Liberty. These documents are, in fact, the same and will hereinafter be cited to as "The Virginia Statute of Religious Freedom" as titled in the Annals of America.

members of the *Rosenberger* Court differed over the proper reading of the *Memorial* as an insight into *Rosenberger's* Establishment Clause question, there are additional passage of the *Memorial* that are unambiguous with regard to the present Free Exercise question. In article 12 of the *Memorial*, Madison charges that "[i]nstead of leveling as far as possible every obstacle to the victorious progress of Truth, [it] . . . would circumscribe it with a wall of defence." *Id.* at 12-13. While this assertion certainly addresses Establishment Clause values, its broader implication is germane to Free Exercise values: government should not place obstacles in the path of the free exercise of religion; rather it should level such obstacles. Washington has not leveled the field; rather it has placed religious education at a unique disadvantage. Such hostility violates the Free Exercise Clause.

2. Joseph Story understood the Clause as allowing government encouragement of religion.

As this brief has noted previously, the court has seen hostility and encouragement as opposites. Therefore, it is important to note that in Joseph Story's influential *Commentaries on the Constitution of the United States,* the connection between encouragement and the other Free Exercise values noted in this brief is explicitly stated. First Story notes that "it is the especial duty of government to foster, and encourage [religion] among all the citizens." Joseph Story, *Commentaries on the Constitution of the United States* § 1865 (Arthur E. Sutherland ed., Da Capo Press 1970) (1833). Then he notes that the Religion Clauses go beyond freedom of conscience to include action and that they contain an anti-leveling component:

> Probably at the time of the adoption of the Constitution, and of the amendment to it, now under consideration, the general if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. Documents from Virginia's battle over religious liberty evince an attitude of prohibition towards government hostility.

Id. at § 1865.

This Court has noted that it has rejected this passage from Story to the extent that it limits encouragement to the Christian religion, *Wallace v. Jaffree*, 472 U.S. 38, 52 (1984). However, as we have seen earlier, this Court has also repeatedly stated the ongoing validity of state encouragement of religion. Similarly, Story's concern about the leveling of Christianity with other religions no longer animates this Court's Free Exercise jurisprudence, but the principle can be more broadly construed for the proposition that government need not level religion with all aspects of public life. Thus, when we look at the Washington Program in light of the historical evidence, we see that it fails to encourage religious exercise. In fact, it is hostile to it. Indeed, it goes beyond leveling religion by uniquely burdening religious education as compared to all other education. Because the Program violates these principles, it violates the Free Exercise Clause.

B. A Stricter View of the Virginia Materials Still Prohibits Hostility

However, even should this Court reject Story's reading of the Religion Clauses, there is another reading of the *Memorial and Remonstrance* that is not dependent on this approach and which therefore still leads to a conclusion of

unconstitutionality. A stricter view of the *Memorial's* Free Exercise principles suggests that the government simply must not be cognizant of religion. *See* Philip Munoz, *James Madison's Principle of Religious Liberty*, Am. Pol. Sci. Rev., Feb. 2003, 17. A non-cognizance reading of the Free Exercise Clause would also prohibit government hostility towards religion. While this view does not espouse a need for the government to foster and encourage religion, it would require government to refrain from taking notice of religion when formulating laws and policies. A non-cognizant government would logically have to refrain from acting with hostility towards religion.

The *Memorial and Remonstrance* provides internal evidence for such a reading. In the first article Madison argued that religion should be "wholly exempt" from civil society's cognizance. James Madison, *Memorial and Remonstrance Against Religious Assessments,* Article 1, *in* 3 *Annals of America* 16 (1968). In the fourth article, Madison accuses Patrick Henry's Assessment Bill of "violat[ing] equality by subjecting some to peculiar burdens." *Id.* at 18. Under a view of non-cognizance, the government could not subject anyone to a peculiar burden on account of religion because the government was required to be blind to religion. It follows that a government blind to religion cannot be hostile to religion.

The doctrine of non-cognizance, while not allowing for the encouragement and fostering of religion still prohibits hostility towards religion. The state of Washington has not adopted a view of non-cognizance, but has explicitly made itself cognizant of religion and those who want to teach it. They go out of their way to exclude those people from generally applicable financial aid programs. Thus, even under this alternative Free Exercise value, the Program is unconstitutional.

C. The Constitutions Proscription of Religious Tests is an Example of the type of hostility they intended the entire Free Exercise Clause to prohibit.

Finally, some insight into the animating principles of the Free Exercise Clause can be gained by looking to another provision of the Constitution, namely the third clause of Article VI, which prohibits religious tests for holding office. Again, one sees a proscription against hostility towards religion. The Framers were aware of the pitfalls that would accompany a nation that was hostile towards religious views. Adopting religious tests would allow those not as tolerant as the framers to "arm [themselves] with all the terrors of the civil power to exterminate those, who doubted [their] dogmas, or resisted its infallibility." Joseph Story, *Commentaries on the Constitution of the United States* § 1841 (Arthur E. Sutherland ed., Da Capo Press 1970) (1833). Another explanation of this clause is provided almost six years before its adoption. In the Virginia Statute of Religious Freedom, Thomas Jefferson said:

> the proscribing [of] any citizen as unworthy [of] the public confidence by laying upon him an incapacity of being called to offices…unless he profess or renounce this or that religious opinion is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right.

Thomas Jefferson, *Virginia Statute of Religious Freedom*, Article 1, *in* 3 *Annals of America* 53-54 (1968).

Chief Justice of the Supreme Court Oliver Ellsworth realized the damaging effects a religious test would have. Ellsworth called religious liberty an "important right of human nature." Oliver Ellsworth, *On a Religious Test for Holding Public Office, in*, 3 *Annals of America* 169 (1968). Ellsworth recognized that the right of a person to exercise his

beliefs without government intrusion was a right that set the United States apart from other countries. His letter, written during the ratification of the Constitution, gives perhaps the best description of this important right. Ellsworth wrote that if a person "be a good and peaceable person, he is liable to no penalties or incapacities on account of his religious sentiments; or, in other words, he is not subject to persecution." *Id.* at 170. He also recognized that this right of human nature limited the power that government could exercise over a persons' religious conscience, saying that government has "no right to set up an inquisition and examine into the private opinions of men." *Id.* at 172.

The prohibition of religious tests is an extension of the effect the framers wanted the Free Exercise Clause to have. A religious test would allow the government to not only discourage, but abolish the ability of certain religious persons to hold public offices. For example, as recognized by this Court, an adoption of a religious test in the form of clergy disqualification for political office would force those clergy to choose between religiously motivated conduct, i.e., the free exercise of religion, and the right to hold public office. *See McDaniel v. Paty*, 435 U.S. 618 (1978).

The Washington Promise Scholarship Program in the present case, as was the clergy disqualification in *McDaniel*, is facially hostile towards religion. The state has created a general program for which Joshua Davey qualified. However, because of his deeply held convictions about becoming a minister, this benefit has been taken away. Because he has qualified for the scholarship and has a right to it, the exception that disqualifies him is hostile to religion and an infringement of his constitutional right to freely exercise his religion.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

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Respectfully submitted

This 8th day of September 2003

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